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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1969

No. [redacted]
156

LEE W. TAUFERNER and
CAROLYN E. TAUFERNER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERITORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EKS AYN ANDERSON
608 El Paso Natural Gas Bldg.
Salt Lake City, Utah 84111

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Petitioners Lee W. Tauferner and Carolyn E. Tauferner pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled cause on February 24, 1969.

CITATIONS TO OPINIONS BELOW

The opinion in this case by the United States Court of Appeals for the Tenth Circuit (reported at 407 F.2d 243) is appended hereto as Appendix A. The decision of the United States District Court for the District of Utah is reported at ..... F. Sup. ....., 21 AFTR 2d 856, and appended hereto as Appendix B.

The opinion of the Ninth Circuit in the case of *Wright v.*

Hartsell, reported at 305 F.2d 221, 10 AFTR 2d 5144, is appended hereto as Appendix C.

The opinion of the Supreme Court in *Commissioner v. Flowers,* reported at 326 U.S. 465, 66 S. Ct. 482, 34 AFTR 301, is appended hereto as Appendix D.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was dated and entered February 24, 1969. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the taxpayer who was required to live a substantial distance from the Thiokol plant which was located in a remote area away from any community because of the hazardous nature of its work, who was not permitted, and was unable due to unavailability of living facilities, to live near the plant, and who was required to travel a substantial distance beyond the nearest habitable place due to the exigencies of the business rather than his personal conveniences and not due to his desire to maintain a home away from the employer's plant—whether such a taxpayer is entitled to deduct the cost of such transportation from the nearest habitable place to his place of employment as an ordinary and necessary expense incurred in carrying on his business, pursuant to Section 162(a) of the Internal Revenue Code of 1954.

2. Whether the taxpayer, as described above, is entitled to deduct such costs of transportation from the nearest habitable place as a travel expense while in the pursuit of his business away from home pursuant to Section 162(a)(2) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

The statute involved in this case is Section 162(a) of the Internal Revenue Code of 1954, 26 U.S.C. Section 162(a), which is as follows:—

> SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> "(a) In General.—There shall be allowed as a deduction all the orinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including —
>
> "(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;
>
> (26 U.S.C. 1964 ed., Sec. 162.)

STATEMENT OF THE CASE

This case involves federal income taxes for the years 1961 and 1962. An action for refund was brought in the District Court for the District of Utah after the taxes had been paid on a deficiency notice and a claim for refund was denied. The District Court gave judgment to the taxpayers, and the Tenth Circuit Court reversed. It is to obtain a review of the Circuit Court decision that this Petition is filed.

The taxpayer was employed by the Thiokol Chemical Corporation as a contracts administrator beginning in May, 1961, and continuing through the years involved. His employment was of an indefinite, as distinguished from a temporary nature. (R. 42)[1]

The Thiokol Chemical plant is located in a remote area away from any community because of the hazardous nature

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[1] "A" references are to the pages of the record on appeal as prepared and numbered by the Clerk of the District Court.

of its business activities, namely, the manufacture and testing of solid fuel rocket engines. The taxpayer was not permitted to live at the plant site, but tried to be as close as possible to his employment. He attempted, unsuccessfully, to buy a home in Corrine, Utah, located 20 miles from the plant, when he first began work there. Thereafter, he bought a home in Brigham City, Utah, located 27 miles from the plant, and has lived there since with his family. (R. 42, 67.) It was stipulated that Corinne was the nearest habitable place to the plant site. (R. 43)

While taxpayer was fortunate to have been able to use the bus service during the years involved, at a cost of seventy cents per round trip, there was not adequate public transportation from Brigham City and particularly not from Corinne to the Thiokol plant. (R. 43-44, 77-78)

It is claimed that the cost of transportation between the nearest habitable place to his place of employment was deductible as an ordinary and necessary expense incurred in carrying on his business pursuant to Section 162(a) of the Internal Revenue Code of 1954, and also as a travel expense while in pursuit of his business away from home, pursuant to Section 162(a)2, upon authority of *Wright v. Hartsell*, supra.

ARGUMENT

The Tenth Circuit Court of Appeals has rendered a decision in this case in conflict with the decision of the Ninth Circuit Court on the same matter.

The Tenth Circuit Court has decided a Federal question in this case which is in conflict with the applicable decisions of the United States Supreme Court.

The situation presented by this petition is as follows:

1. In this case the taxpayer below, Tauferner, lived in Brigham City, Utah, and was required to travel to his place of business at the Thiokol Chemical plant site which was located in a remote area due to the hazardous nature of its business activities and where it was impossible for the taxpayer to live. The nearest habitable place was Corrine, Utah, which was 20 miles away from the plant site. The lower court allowed the deduction for the cost of transportation for the entire distance from Brigham City to the plant site.

In the appeal by the government to the Tenth Circuit Court, Tauferner conceded the requirement of mitigation of expense and urged the adoption of an objective rule, as in *Wright v. Hartsell*, based upon the nearest habitable place limitation, urging that such part of the cost of transportation between the nearest habitable place and the more distant place of business is deductible as being ordinary and necessary expense in carrying on a trade or business, being the business of the employee.

In its decision the Tenth Circuit reversed and denied any deduction whatever. Not only did the Tenth Circuit reject the idea of an allowance for the cost of travel between the nearest habitable place and the place of business, but completely rejected any idea of any factor under any circumstances, for the deduction of any part of the cost of travel ". . . when the taxpayer is going to the place where he begins work or is returning from the place where he ceases work . . ." The Tenth Circuit said that "the nature of the work engaged in, the distance traveled, the mode of transportation, the degree of 'necessity' appear to be unsatisfactory guides with any degree of consistency and certainty.

The Tenth Circuit in this case referred to the principle of "necessity" and also cited the Supreme Court case of *Commissioner v. Flowers,* supra, in which this Court stated that "the exigencies of business rather than personal convenience and necessities of the traveler must be the motivating factors." The court also referred to the Supreme Court case in *United States v. Correll,* 389 U.S. 299, in which this Court stated that ". . . any rule in this area must make some rather arbitrary distinctions."

2. The Ninth Circuit in *Wright v. Hartsell,* allowed the taxpayer, an employee construction worker, to deduct part of the cost of transportation in traveling between his home in Pocatello, Idaho ,and the A.E.C. site in the desert 70 miles away. That part which the taxpayer was allowed to deduct was the cost of traveling between Arco, Idaho, and the A.E.C. site, Arco being the nearest habitable place to the plant site, 46 miles away. The court stated that "a taxpayer's inability to live near his job site is a valid ground for deduction as travel expense of the resulting cost of his transportation . . ." The court further stated that "the fundamental question in determining if an expense claimed as travel expense is incurred as a matter of choice or is dictated by the 'exigencies of business' is whether it would be reasonable for the particular taxpayer to move his home nearer the place where he is working."

The expression "exigencies of business" was quoted from the United States Supreme Court case *Flowers v. Commissioner,* supra, in which this Court said that "the exigencies of business rather than the personal convenience and necessities of this taxpayer must be the motivating factor."

The allowance from Arco only was on the principle of mitigation of expense by requiring that the taxpayer move as near to the job site as is reasonable and that the amount

of deduction is gauged in that light.

3. The United States Supreme Court in the case of *Commissioner v. Flowers,* (1945),326 U.S. 465, 66 S. Ct. 250 (34 AFTR 301) used language on the subject of the cost of transportation in connection with the pursuit or carrying on of a trade or business, with which language the Tenth Circuit decision in this Tauferner case is in conflict. The *Flowers* case involved an attorney who preferred to live in Jackson, Mississippi, and who traveled to Mobile, Alabama, where he worked for the railroad company as its general counsel, The taxpayer was unwilling to move from Jackson to Mobile even though as the court held, the taxpayer's principal post of business was at the main office in Mobile. The Court supported the Commissioner in disallowing the cost of the taxpayer's travel from Jackson to Mobile under Section 23 of the Code, the predecessor Section 162 of the 1954 Code.

The Supreme Court commented upon the extra cost involved in traveling from Jackson to Mobile as being ". . . unnecessary and inappropriate to the development of the railroad's business" and as being ". . . solely as the result of the *taxpayer's desire* to maintain a home in Jackson while working in Mobile . . ." (see D.11. Emphasis added) and then concluded as follows:

> "The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors."

It was stated in *Flowers,* at page 252, that the predecessor of Section 162(a) (2) "is one of the specific examples given by Congress in that section of ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." (The latter is the predecessor of Sec. 162(a).)

4. In *Tauferner* the Court said that the Ninth Circuit departed from *Hartsell* in *Smith v. Warren*, 338 F.2d 671, 21 AFTR 625 (1968). The Tenth Circuit recognized that the Court in *Smith v. Warren* did not discuss or cite its prior case of *Hartsell*, but instead based its decision on the Fifth Circuit cases of *Steinhort v. Commissioner*, 335 F.2d 496, 14 AFTR 2d 5433, and *Heuer v. Commissioner*, 283 F.2nd 865. All of these cases involved ship pilots who were not allowed to deduct the cost of travel from home to their first assignments and return home from the last assignments.

It is suggested, however, that the Ninth Circuit had in mind the distinguishing factor in *Smith v. Warren* when it did not refer to *Hartsell*, that being the element of preference in *Smith v. Warren*. The court said at page 673:

> "Appellant's position was not essentially different from that of other taxpayers, particularly those engaged in the professions, who, for personal reasons sufficient to themselves, *prefer* to live in the suburbs. . . ." (Emphasis added)

In the later of the Fifth Circuit cases, *Steinhort*, where the taxpayer lived at a point varying from 1 mile to 59.75 miles from the various docking facilities, that Court, while holding against the taxpayer, made a significant contribution to the subject of what constitutes non-deductible commuting. On page 501 of 335 F.2d it referred to the "true blue, metropolitan commuter who chooses for family and personal considerations to live in a far off suburb rather than a close-by city apartment . . ." It also said in note 24 on page 502:

> ". . . The 'temporary,' 'indeterminate' distinction, although of great use in determining deductibility of expenses under Sec. 162(a)(2) where work is done in another district locality, does not cut into the principle

of denying a deduction for 'commuting expenses' for travel *within the same metropolitan area* as the taxpayer's established home." (Emphasis added)

That stated principle of "metropolitan area" as a basis and definition of "commuting" does not conflict with the position herein of the taxpayer, Tauferner. On the other hand it fortifies Tauferner's position. It certainly could not be said that the Thiokol plant, located in a remote area away from any community, is in the metropolitan area of Brigham City or the nearest habitable place, Corinne.

Webster's International Dictionary (Third Edition) defines "metropolitan" as "relating to or constituting a region including a city and the densely populated surrounding areas that are socially and economically integrated with it."

The Supreme Court case of *U.S. v. Correll,* 88 S. Ct. 445, 20 AFTR 2d 5845, was cited by the Tenth Circuit to establish that "any rule in this area must make some rather arbitrary distinctions."

It is pointed out that the *Correll* case involved the deductibility of meals and the sleep or rest rule. Further, it is respectfully noted that there were three dissents in that case.

Commissioner v. Bagley, 344 F.2d 204, 19 AFTR 2d 924, and *Commissioner v. Stidger,* 386 U.S. 287, 19 AFTR 2d 959, cited by the Tenth Circuit, both involved deductions for meals while away from home. In *Bagley* the Court affirmed the proposition that "if a taxpayer *chooses* to live in one locality and work in another, normally his travel from one to the other is regarded as being for his personal convenience." (Uage 205. Emphasis added)

Stidger also involved a special circumstance, being that of the permanent duty station of a military officer.

5. The Ninth Circuit in *Hartsell* and the Supreme Court in *Flowers* recognized that there may be certain circumstances in which a taxpayer may deduct part of the cost of transportation in traveling between his place of residence and his place of employment. In *Hartsell* that portion allowed as a deduction was the cost of traveling between the nearest habitable place and the place of business. The Ninth Circuit relied on the "exigencies of busness" principle and the language used in the decision in *Flowers* in sustaining its position.

The Tenth Circuit in *Tauferner* precluded any circumstances as justifying the deduction of any part of the cost of transportation between a taxpayer's residence and his place of business, in conflict with the Ninth Circuit in *Hartsell* and in conflict and disregard of the principle and language in the Supreme Court decision in *Flowers*.

It is submitted that there are some proper circumstances under which part of the cost of transportation between one's residence and place of business may be deductible, and that this principle should be stated by the Supreme Court and the conflict resolved. It is submitted further, that the circumstances in this case present such a situation.

6. It is submitted that the distance of 20 miles from Corinne, the nearest habitable place, to the Thiokol plant site is a substantial distance.

Congress has recognized the distance of 20 miles in connection with moving expenses. Section 217 of the Internal Revenue Code (26 U.S.C. Sec. 217) allows a deduction for moving expenses in certain circumtances where the new principal place of work ". . . is at least 20 miles from his former residence." (Sec. 217(c))

THE QUESTIONS ARE SUBSTANTIAL

Clearly, the questions presented are of importance in the administration of the federal tax laws. There were approximately 2,000 employees at Thiokol in 1967, and the plant is still in operation. Undoubtedly, there are many others throughout the country who are employed at somewhat similarly established plants who have an interest in the resolution of this conflict between the circuits, and also who should have the benefit of a definitive statement by the Supreme Court with respect to the principles set forth in *Commissioner v. Flowers.*

It is submitted that settlement of the questions herein by this Court is plainly in the public interest.

CONCLUSION

The decision of the Tenth Circuit is in error, being in conflict with the principles and language in *Commisssioner v. Flowers.* Also, it is in direct conflict with the Ninth Circuit decision in *Wright v. Hartsell.* The resolution of such conflict between the Circuits and the decision of this Court is necessary and is in the public interest.

It is respectfully urged that a Writ of Certiorari be granted in this case.

Respectfully submitted,

EKS AYN ANDERSON
608 El Paso Natural Gas Building
Salt Lake City, Utah
Attorney for Petitioner